SINGAPORE REPORTS.

TUNGKU ABUBAKAR & OTHERS v. HIS HIGHNESS THE SULTAN OF JOHORE.

[Orig. Civil Juris. (Gordon-Smith, J.) April 7, 1949]

[Singapore — Originating Summons No. 23 of 1947]

Constitutional Law — Sovereignty — Whether Court has jurisdiction over Sultan of Johore — Submission to jurisdiction — Proceedings in Japanese Court — Japanese Judgments and Civil Proceedings Ordinance 1946.

This was a Summons in Chambers in which it was sought to set aside an Originating Summons on the ground that the Court had no jurisdiction over His Highness Sir Ibrahim the Sultan of Johore who is a sovereign ruler. The Originating Summons was taken out by the Trustees of a Settlement made between His Highness the Sultan of Johore and Tungku Abubakar and prayed for an order that a Japanese decree made in Originating Summons No. 24 of 2605 (1945) in the Japanese Court of a Judge at Singapore be set aside.

Held, (1) that in consequence of the Federation agreements dated the 21st of April 1948 and the Federation of Malaya Order in Council 1948, His Highness the Sultan of Johore regained his former status of a sovereign ruler, subject to the Agreements and the Order in Council; (2) that he is therefore entitled to the immunities, privileges and prerogatives usually accorded by the comity of nations to a sovereign ruler and is not subject to the jurisdiction of the Court of the Colony unless he has submitted to such jurisdiction; (3) that His Highness the Sultan of Johore had in fact submitted to the jurisdiction of the Court in presenting the Originating Summons in 1945 and obtaining a decree thereon and as the present Originating Summons was a continuation of such earlier proceedings as authorised by the Japanese Judgments and Civil Proceedings Ordinance 1946, it can and should continue.

Cases referred to:—

(1) *Mighell v. Sultan of Johore* (1894) 1 Q.B. 149.
(2) *Stathum v. Stathum* 1912 P. 92.
(3) *Duff Development Co. Ltd. v. Kelantan Government* (1924) A.C. 797.
(4) *Pahang Consolidated Co. Ltd. v. State of Pahang* (1933) M.L.J. 247; (1933) M.L.J. 390.
(5) *Foster v. Venture Globe Syndicate Ltd.* (1900) 1 Ch. 139.
(6) *Republic of Bolivia Exploration Syndicate* (1914) 1 Ch. 139.
(7) *Suarez v. Suarez* (1918) 1 Ch. 176.
(8) *The Jupiter* (1924) P. 236.
(9) *Luther v. Sagor* (1921) 1 K.B. 456; (1921) 3 K.B. 532.
(10) *Strousberg v. Republic of Costa Rica* 44 L.T. 199.
(11) *The Annette* (1919) Prob. 111.
(12) *Taylor v. Best* 139 E.R. 201.
(13) *In re Gourju's Will Trusts* (1943) Ch. 24.

SUMMONS IN CHAMBERS ADJOURNED INTO OPEN COURT.

John Laycock (*D. Murphy* with him) for the Applicants.

E. D. Shearn (*K. A. Seth* with him) for the Respondent.

Gordon-Smith, J. : — This is Summons in Chambers No. 564/1947 dated 11th October, 1947, arising out of the above Originating Summons which was filed on the 14th April previously. Considerable difficulty had been experienced in the service of the Originating Summons and eventually a conditional appearance was filed on the 8th October 1947 on behalf of His Highness Sir Ibrahim the Sultan of Johore but which was without prejudice to an application to set aside the Originating Summons and all proceedings therein. This Summons in Chambers asks for the above relief on the ground "that the Honourable Court has no jurisdiction over His Highness Sir Ibrahim the Sultan of Johore who is a sovereign ruler."

Eventually this summons was adjourned into Open Court for argument and was heard on the 15th to 18th March 1949 inclusive. During the course of the argument the following authorities were referred to at length :—

Mighell v. Sultan of Johore[1].
Stathum v. Stathum[2].
Duff Development Co. Ltd. v. Kelantan Government[3].
Pahang Consolidated Co. Ltd. v. State of Pahang[4].

Hereafter I refer to these four cases respectively as the *Johore* Case, the *Baroda* Case, the *Kelantan* Case and the *Pahang* Case.

Foster v. Venture Globe Syndicate Ltd.[5].
Republic of Bolivia Exploration Syndicate[6].
Suarez v. Suarez[7].
The Jupiter[8].
Luther v. Sagor[9].
Strousberg v. Republic of Costa Rica[10].
The Annette[11].
Taylor v. Best[12].
In re Gourju's Will Trusts[13].

The following text books were also referred to :—

2 *Hails* 10, paras. 10 to 13.

11 *Hails* pp. 10 to 17.

Keith's Constitutional Law, pp. 553, 555, 558.

Oppenheim: International Law 6th Ed. pp. 175 & 255.

Dicey's Conflict of Laws, 5th Ed. pp. 192 et seq.

Anson's Law and Custom of the Constitution, 4th Ed. Vol. II, 106.

Westlake's Private International Law, 7th Ed. p. 266.

Webber's Effect of War on Contracts, 2nd Ed. p. 219.

Schwarzenberger: International Law, Vol. I, p. 79.

Salmond's Jurisprudence, 7th Ed. p. 157 and Appendix V.

Local Enactments referred to were :—

Ordinance 37 of 1946, Japanese Judgments and Civil Proceedings Ordinance, which came into force on 15th January 1947.

Malayan Union Order in Council, 1946, dated 27th March 1946, which came into force on 1st April, 1946.

Federation of Malaya Order in Council, 1948, dated 26th January 1948, which came into force on 1st February 1948.

There were also the various Agreements to be read in conjunction with these Orders in Council which will be referred to later.

Before considering these authorities it is necessary to refer to the claim set out in the Originating Summons and the facts. This Originating Summons prays, on behalf of the Applicants Abubakar Tungku Aris Bendahara, the second son of His Highness, and two other trustees, namely, H. W. Cowling and G. H. Garlick, being the persons aggrieved by a Japanese Decree dated 18th June 2605 (1945) and made in Originating Summons No. 24 of 2605 (1945) by the Syonan Kotohoin at Syonan-to (being the Japanese Court of the Judge at Singapore), praying for an Order that such Decree be set aside wholly or that the Applicants be at liberty to appeal against the whole of such Decree on the grounds therein set forth. I am not concerned with the merits of this Originating Summons at the present time, but from the affidavits filed in support some of the following facts appear to be relevant :—

(1) In 1903 His Highness by an Indenture of Conveyance conveyed to the then Sultanah of Johore, Rugiah, in fee simple two properties situate in the Island of Singapore;

(2) In 1926 Rugiah died intestate and Letters of Administration were granted by the Supreme Court of the Straits Settlements to Tungku Abubakar, who was entitled under the intestacy to three-fourths of her estate, His Highness as her husband, being entitled to one-fourth.

(3) On 22nd December 1926 by Indenture of Settlement made between His Highness and Tungku Abubakar these two properties were conveyed to His Highness upon the Trusts therein declared and His Highness declared that he would stand possessed of the property upon trust, for the eldest daughter of the said Tungku Abubakar during her life and after her decease upon Trust for any of her issue living at her decease. The beneficial interest in this Trust property is now vested in the Applicants to the Originating Summons as Trustees.

(4) By an Originating Summons dated 3rd May 2605 (1945) His Highness applied to the Court at Singapore and swore a long affidavit in support, in accordance with the Rules of Court, asking for construction of the terms of these two Indentures. His Highness was the plaintiff in the suit and the Custodian of Enemy Property, Syonan, the defendant. There was no appearance by the defendant and the matter was argued *ex parte*. Judgment was delivered on the 18th June 1945, the effect of which was incorporated in a formal Order of Court of the same date, ruling that the two Deeds were invalid and that the two properties mentioned reverted to His Highness as the sole beneficial owner thereof.

As I have said, I am not concerned with the merits or otherwise of this Japanese judgment. When this present Summons in Chambers came on for hearing it was adjourned in the first instance, in order that information might be obtained from His Majesty's Secretary of State for the Colonies, the question asked being "whether His Highness the Sultan of Johore is or is not an independent sovereign ruler." In due course the Secretary of State replied by letter dated 9th June 1948. The contents of this letter were communicated to the parties concerned and they made a request for further information upon the question

"whether His Highness was an independent sovereign ruler at the time which is material to these proceedings in 1947, before the Agreements of 1948 came into force." This request was forwarded by the Judge in a letter dated 6th July 1948 and in due course a further reply dated 12th November 1948 was received.

As these two letters containing this information are of paramount importance on the questions arising before me, I set them out verbatim in an Appendix to this judgment. At the hearing before me, at the conclusion of Mr. Shearn's address for the Applicants to this Summons, I summarised in a condensed form the main and material submissions he had made which were :—

(1) That irrespective of whatever the status of His Highness may or may not have been prior to 1948, that is, when the Federation of Malaya was constituted on 1st February 1948, His Highness is now a sovereign ruler, and being so, the proceedings could not continue;

(2) That at no time had there been any waiver of his privileges as such sovereign ruler;

(3) That the proceedings under this Originating Summons are new proceedings and are separate and distinct to, although connected with, the Japanese Originating Summons No. 24 of 1945, to which I have referred above.

Mr. Shearn expressed his concurrence with the terms of these submissions as so formulated.

It will be noted that the original request made by the Judge to the Secretary of State was whether His Highness was "an independent sovereign." The question of such independence will be discussed hereafter.

The *Johore* Case, *Baroda* Case, *Pahang* Case and in particular the *Kelantan* Case, were all referred to at length during the argument and it is necessary to consider these cases in some detail.

The *Johore* Case was decided in 1893 by Wills, J., whose judgment was confirmed by the Court of Appeal subsequently and has been cited with approval and followed in subsequent cases. It also concerns the status of the present Applicant, who is the same Sultan of Johore now as at that time*. The letter from the Colonial Office is not set out verbatim but enclosed a copy of the 1885 Treaty and stated that Johore was an independent State; that the defendant was the present sovereign ruler thereof; that the relations between the Sultan and Her Majesty were relations of alliance and not of suzerainty and dependence; it referred to the Sultan having raised and maintained armed forces, organized a postal system, dispensed justice, founded orders of knighthood, conferred honours and "generally speaking," exercised without question the usual attributes of a sovereign "ruler".

Wills, J. stated: "It is true, as appears from the copy of the treaty annexed to that letter, that he has bound himself not to exercise some of the rights of a sovereign ruler except in certain particular ways: but that does not deprive him of his character as an independent sovereign."

It is clear, therefore, that in 1893 His Highness was regarded not only as a sovereign ruler but as an independent sovereign ruler.

The *Baroda* Case was somewhat similar and followed the principle laid down in the *Johore* Case. The certificate from the India Office in that case is set out at p. 95 of the report from which it appears that the Gaekwar of Baroda had been recognised as a ruling chief under the suzerainty of His Majesty, that "the British Government does not regard or treat His Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty." "But, though His Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law but is inherent in the ruling chief of Baroda, subject however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights as have by treaty, usage or otherwise passed to and are exercised by the suzerain such as....." (setting out various specified matters).

I next come to the *Kelantan* Case decided in the House of Lords in 1924 by an extremely strong House, the judgments of all the learned law Lords being referred to at length and in some considerable detail. Again, the principles laid down in the *Johore* Case were approved and followed. It was held :—

(1) that the statement in the letter as to the sovereignty of Kelantan and its rulers was not intended to be qualified by the terms of the agreement, and that the letter was conclusive;

(2) (by Viscount Cave, Viscount Finlay, Lord Dunedin and Lord Sumner; Lord Carson dissenting) that the Government of Kelantan had not submitted to the jurisdiction of the Court for the purpose of the proceedings to enforce the award, either by assenting to the arbitration clause or by applying to the Court to set aside the award.

* He was in fact the father of the present Sultan.—Ed. M.L.J.

The reply to the requisite inquiry by Master Jelf from an Under Secretary of State for the Colonies is set out on pp. 806/7 of the report and enclosed copies of the relevant treaties. It is stated "that Kelantan is an independent State and that His Highness the Sultan ..... is the present ruler thereof"; that "the present relations between His Majesty the King and the Sultan of Kelantan which are those of friendship and protection are regulated by an agreement signed on the 22nd October 1910." A copy of such agreement was enclosed; that "His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan," and the reply went on to specify that the Sultan in Council made laws, dispensed justice, conferred titles of honour "and generally speaking exercises without question the usual attributes of sovereignty."

I now pass on to the *Pahang* Case. At p. 391 of the Privy Council Appeal report Lord Tomlin sets out a summary of the constitutional position in Pahang and stated "(1) The Sultan of Pahang is an absolute ruler in whom resides all legislative and executive power, subject only to the limitations which he has from time to time imposed upon himself in the circumstances hereinafter mentioned." Lord Tomlin then proceeded to enumerate these circumstances, namely, (a) the agreement in 1888 to administer the country with the advice of a British Resident, (b) the establishment of a State Council, (c) the Federation in 1895 of the four Malay States by Treaty, but such Treaty did not curtail any of the powers of the Ruler of the State of Pahang, within his State and (d) the agreed Constitution in 1909 of a Federal Council with legislative powers, but again, nothing in the agreement was intended to curtail any of the powers or authority held by any of the Rulers in their respective States. The Constitution of such Federal Council was varied from time to time by agreement between His Majesty the King and the Rulers but with the proviso that nothing therein was intended to curtail the powers then held by the Rulers in their respective States or to alter the relations then existing between the States and the British Empire as established by previous Treaties.

This case was quoted by Mr. Shearn as having some relevance to the position of His Highness *vis a vis* the Malayan Union and the Federation of Malaya Orders in Council and agreements therefor, in view of the delegated legislative and other powers. One thing that appears to be quite settled is that the reply by or on behalf of a Minister of State (whether of the Foreign Office, Colonial Office or Board of Trade) in reply to a formal enquiry by the Court as to the status of a Ruler, and whether that Ruler is a Foreign Sovereign or Foreign Government or whether such Ruler is of a Protectorate or Protected State or is under suzerainty, such reply is conclusive. I now turn to the replies emanating from the Colonial Office and which are set out in full in the Appendix to this judgment — Letter dated the 9th June 1948 signed by Mr. Creech Jones. In paragraph 2 His Highness is recognised as the Ruler of the State and "as such he exercises attributes of sovereignty." Paragraphs 3, 4, 5, 6 and 7 are factual statements dealing with the Federation of Malaya Agreement 1948 and the Johore Agreement 1948 and analyses the contents of these agreements. Paragraph 8 states "The independence of the State of Johore and the sovereignty of its Ruler, as recognised in the case of *Mighell v. the Sultan of Johore,* to which reference is made in the communication under reply, are thus subject to the limitations consequent upon fresh rights and obligations under the Agreements of 1948 and generally upon the position of that State as a member of the Federation of Malaya."

The further letter, dated the 12th November 1948 and signed by Lord Listowel, deals mainly with the position of His Highness under the Malayan Union Order in Council 1946 and the agreements therefor (The Johore Agreement is dated the 20th October 1945).

But it is to be noted that the 2nd paragraph of this letter commences "Before the 20th October 1945, His Majesty had no jurisdiction in Johore." This paragraph then goes on to refer to the original agreement of 1885, the agreement of 1914 and the Constitution enacted in 1895 and various supplements. It will be observed that by the Agreement of 1914 His Highness had agreed to receive an accredited British Adviser whose advice he was obliged to ask and act upon "on all matters affecting the general administration of the country and on all questions other than those touching Malay Religion and Custom." This, in effect, is in similar terms to the undertaking or agreement by the Sultan of Kelantan and which was in existence and subsisting at the time the Kelantan case was decided by the House of Lords.

Paragraph 4 of this letter refers to the agreement of the 20th October 1945 by which His Highness agreed that His Majesty *should have full power and jurisdiction within the State and Territory of Johore* and that the subsisting agreements (i.e. of 1885 and 1914) should be preserved *save and in so far as they are inconsistent with this new agreement or with such*

future constitutional arrangements for Malaya as might be approved by His Majesty.

In paragrph 5, the letter then goes on to refer in some detail to the Malayan Union Order in Council and then in paragraphs 12 and 13 states as follows :—

The Constitution of the State of Johore.

> In general, the existing laws were preserved by the Malayan Union Order in Council subject, however, to the provisions of the Order itself. One of the existing laws was the Constitution of the State of Johore which therefore continued in force except so far as its provisions were inconsistent with the Order. The precise extent to which the particular provisions of the Constitution were preserved by the Malayan Union Order in Council, being a matter of legal interpretation, is one upon which the Secretary of State feels that it would not be proper for him to pronounce. His Majesty's Government, however, recognize that the Sultan of Johore possessed sufficient sovereignty in and over Johore to enable him to make on behalf of himself and his successors in the Sultanate the Johore Agreement, 1948, providing for the future government of Johore as a Member State of the Federation of Malaya.
>
> It will be observed, therefore, that under both the provisions of the Order in Council which came into operation and the permanent regime which never took effect, the position of Johore as an independent State and the sovereign powers of the Sultan were materially affected by the incorporation of the State in the Malayan Union and generally by the situation brought about by the Agreement of the 20th October, 1945; but that the State retained its identity and the Sultan continued to possess certain attributes of sovereignty.

I would emphasize the words "the precise extent to which the particular provisions of the constitution were preserved by the Malayan Union Order in Council, being a matter of legal interpretation, is one upon which the Secretary of State feels that it would not be proper for him to pronounce," and again "the position of Johore as an independent State and the sovereign powers of the Sultan were materially affected by the incorporation of the State in the Malayan Union and generally by the situation brought about by the Agreement of the 20th October 1945". I agree entirely with the latter statement — but it does not answer the question asked by the Court and which question the Court was entitled to ask and entitled to receive an answer. Any such answer would have been accepted by the Court as conclusive, instead of which there are long factual statements and an equivocal answer to the question put. The burden of answering the question is, therefore, cast on this Court, anyhow in the first instance.

Having regard to the terms of the agreement of the 20th October 1945 and of the subsequent Malayan Union Order in Council, I have no hesitation in saying that, in my opinion, His Highness had thereby abandoned, or acquiesced in the abandonment of, his position and status of an independent Sovereign Ruler. The first recital to the Malayan Union Order in Council shews this as also does the second recital. A Governor and Commander-in-Chief to be appointed by His Majesty is provided for, and in whom the chief executive power is vested, in the name of and on behalf of His Majesty. His Majesty appoints the Chief Justice and other Judges, and land grants are to be made in His Majesty's name, and even the power of pardon is vested in the Governor and not in the Sultans. The Order reserved power to His Majesty to legislate for the Union and to disallow any legislation passed by the legislature of the Union, and in this and many other respects follows the usual form of Orders in Council enacted for Colonies annexed to the Crown as part of its dominions.

I hold, therefore, that prior to the 20th October 1945 His Highness was an independent Sovereign Ruler with the usual attributes of sovereignty but subject to the provisions of the 1885 and 1914 Agreements. I am fortified in this opinion not only by the authorities I have quoted but also by Clause 15 of the subsequent agreement dated the 21st January 1948 to be referred to hereafter.

I hold further that subsequent to the 20th and during the subsistence of the Agreement of the 20th October 1945 His Highness was not such an independent Sovereign Ruler.

It is necessary, however, to consider what His Highness's position was during the Japanese occupation. On this point there is no evidence before me that his status was changed. Throughout the Japanese proceedings in Originating Summons No. 24 of 2605 (1945) including the judgment and formal Order of Court thereon, he was referred to as His Highness the Sultan of Johore. In this connection I would quote from *Schwarzenberger* at page 129 :—

> In the absence of an authoritative pronouncement on this point by either of the International Courts, the law, as it stands, appears to be best formulated in Borel's award in the **Ottoman Debt Arbitration** (1925). Whatever may be the effects of occupation of a territory by the adversary before the re-establishment of peace, it is certain that this occupation alone does not juridically create transfer of sovereignty.

Again, *Oppenheim* p. 519 paragraph 237 :—

> Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the Sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror.

For these brief reasons, and this point was not argued before me, I hold that there was no change in

the status of His Highness during the Japanese Occupation.

The foregoing however does not conclude the matter of His Highness's status, as one of Mr. Shearn's submissions was that it is his present status to-day that is material and that because of such status, these proceedings cannot continue.

The Malayan Union Order in Council 1946 was cancelled and revoked by the Federation of Malaya Order in Council 1948 which is dated the 26th January 1948 and which came into force on the 1st February following. The reasons for such revocation are set out in the recitals to such Order and, as stated in the 7th recital, it was because it had been represented to His Majesty that fresh arrangements should be made for the government and administration of the Malay States in conjunction with the Settlements. The ninth recital refers to new individual State Agreements with the Rulers of each State and to a comprehensive and combined agreement between His Majesty and all the Rulers, referred to as the Federation Agreement. All these agreements are set out in Schedules to the Order. The respective State Agreements are, in effect, uniform but I am only concerned with the Johore Agreement and the Federation Agreement, which latter, in accordance with Section 5 of the Order in Council, has the force of law throughout the Federation.

All such agreements are dated the 21st January 1948 and ante-date the Order in Council and necessarily so, as they are the basis and authority for the new and subsequent Order in Council.

The fourth recital of the Johore Agreement states that it is expedient to provide for the constitutional development of the State of Johore under the protection of His Majesty and for its future government.

Under Clause 3(1) His Majesty has complete control of defence and external affairs of the State and under sub-Clause (2) His Highness undertakes to refrain from entering into any Treaty or taking part in political matters with any foreign State.

Clause 4 is similar in terms to what was contained in the 1914 Agreement as regards a British Adviser.

Under Clause 9 His Highness undertakes to govern the State in accordance with the provisions of a written Constitution which shall be in conformity with this agreement and the Federation Agreement.

Clause 14(1) revokes the previous agreement of the 20th October 1945 and under sub-clause (2) previous treaties and other agreements are preserved, in so far as they are not inconsistent with this Agreement and the Federation Agreement.

Clause 15 is of paramount importance and I therefore set it out verbatim as follows:—

> The prerogatives, power and jurisdiction of His Highness within the State of Johore shall be those which His Highness the Sultan of Johore possessed on the first day of December 1941, subject nevertheless to the provisions of the Federation Agreement and this Agreement.

The marginal note to this clause is "Sovereignty of the Ruler." Nothing could be plainer or less ambiguous and the clause means what it says, i.e. subject to the agreements, His Highness is re-instated in all the prerogatives, power and jurisdiction that he possessed on the 1st December 1941. I have already held that at that date (and subsequently thereto) he was an independent Sovereign Ruler until the Agreement of the 20th October 1945 took away such status, which by Clause 14 of this Agreement, is cancelled and revoked.

It remains to be seen whether there is anything in this Agreement or the Federation Agreement or the Federation Order in Council which limits or abrogates such status.

As regards Clause 4 of this Johore Agreement referring to a British Adviser, there was a somewhat similar provision in the Kelantan Treaty dated 22nd October 1910, i.e. long before the *Kelantan* Case decided that the Sultan was an independent Sovereign Ruler. Somewhat similarly as regards Pahang, in the Treaty of 1887, followed in 1895 by the Federal Treaty by a more specific but similar provision. This was long before the *Pahang* Case decided that the Sultan was an absolute Ruler. In the one case, Kelantan was one of the Unfederated States and in the other case, Pahang was one of the Federated Malay States and both Sultans were held to be Sovereign Rulers.

As regard the Federation Agreement, Mr. Laycock went through it clause by clause in order to illustrate that His Highness had divested himself of his sovereignty by entering into such agreement. But the third recital in referring to the State Agreements says that such agreements were entered into "for the purpose of ensuring that power and jurisdiction shall be exercised by Their several Highnesses in their several States." I agree that one of the objects of the agreement was to establish a Federation with a strong central government and that there should be a common form of citizenship. It is to be noted that the former Settlements of Penang and Malacca (parts of a Colony, not a Protectorate) also were included in this

Federation and one cannot help but ask oneself the question as to whether His Majesty had divested himself of his sovereignty in these two Settlements by being a party to this Agreement? I think not, and see Clause 154 of the Agreement which says that nothing in the agreement shall affect the powers of His Majesty or Imperial Parliament to make laws for the defence or the external affairs of the Federation or shall affect His Majesty's sovereignty and jurisdiction in and over the Settlements. A clear distinction is here made between the former Malay States and Settlements. Similarly, and as a counterpart of the preceding Clause, Clause 155 of the Agreement says that "Save as expressed herein this Agreement shall not affect the sovereignty and jurisdiction of Their Highnesses the Rulers in their several States." Also, further safeguards against invasion of the Rulers' collective and individual sovereignty and jurisdiction without their own assent either individually or collectively as regards the Federation through the Conference of Rulers, are clearly expressed in many clauses of the Agreement. In particular, see Clause 6 providing that the Agreement (which has the force of law) cannot be amended without the prior approval of His Majesty *and* the Conference of Rulers. I do not think that it is necessary for me to go through the Agreement clause by clause or the Federation Order in Council section by section, as I have said sufficient to indicate that, in my opinion, there is nothing in either which takes away the sovereignty or jurisdiction of the Sultans individually within their States, or collectively in the Federation, although strictly speaking I am only concerned with His Highness and the State of Johore.

It only remains to make a few remarks on Sovereignty and Protectorates, on this part of the submission. The mere fact that one Sovereign Ruler or Sovereign State concludes Treaties with a more powerful Sovereign Ruler or Sovereign State and thereby undertakes to perform, or refrain from performing, any particular acts, does not, in my opinion, necessarily involve an abandonment of sovereignty although the total independence of such Sovereign Ruler or Sovereign State may thereby be limited in a greater or lesser degree. Such appears to be the position of the Rulers of the Malay States which latter I myself would now describe as Protectorates and which are not full Sovereign States. In paragraph 65 at p. 115 Dr. Oppenheim says :—

> "All States which are under the suzerainty or under the protection of another State, or are members of a so-called Federal State, belong to this group" and he goes on to say "Their monarchs enjoy the privileges which, according to the Law of Nations, the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly, but the very existence of States without full sovereignty is an anomaly in itself."

I think that this aptly describes the status of the Malay States and their Rulers and I therefore agree with Mr. Shearn's first proposition. My answer, therefore, to this first submission is that His Highness is a Sovereign Ruler and he is entitled to the privileges and prerogatives usually accorded to such a Sovereign Ruler and which by international comity induces every Sovereign State to respect the independence and dignity of every other Sovereign State. I would, however, add that in the exercise of such privileges and prerogatives he has, particularly in regard to the administration and executive Government in the State of Johore, limited himself in the exercise of these privileges and prerogatives as appears in the Johore Agreement of the 21st January 1948, the Federal Agreement of the same date and the subsequent Federation of Malaya Order in Council 1948, dated the 27th January 1948.

This, however, does not conclude the matter and it remains for me to consider the remaining submissions. The second submission was that at no time had there been any waiver by His Highness of his privileges as such Sovereign Ruler. The final submission was that these proceedings are new proceedings and are separate and distinct to, although connected with, the Japanese proceedings in 1945.

Although these two submissions require separate answers, they can be considered together.

I have already referred in some detail to the Originating Summons No. 24 of 1945 taken out by His Highness not long before the Japanese regime ended and to the judgment thereon. It is somewhat of a coincidence that the formal Order of Court dated 22.6.45 on this judgment is signed by the same individual, as Assistant Registrar then, as signed the present Originating Summons 23/1947 dated 14.4.47.

Putting the points briefly they are, whether His Highness has, by waiving his privileges and prerogatives and submitting himself to the jurisdiction of the Court in 1945 (he was himself the Applicant), such waiver and submission continues in and applies to these present proceedings? And are the present proceedings a continuation of those 1945 proceedings and in the same Court?

In the first place, although Originating Summons 24 of 2605, i.e. 1945, is headed "In the Court of the Judge at Syonan" yet it is intituled "In the matter of Order 52 Rule 5 of The Rules of the Supreme Court, 1934."

Although the Japanese may have called the Court by a slightly different name, there is no evidence or information before me that they passed any amending legislation whatsoever either altering the name of the previous High Court or making any alteration in its constitution, jurisdiction or powers or its procedure and I understand that such Court, certainly in its Civil jurisdiction, carried on exactly the same as prior to the surrender, with many of the same personnel employed as previously. The Judge who gave the decision was previously a practising advocate of the Colony and was appointed to be a Judge by the Japanese and similar appointments had been made prior to the surrender and have been made since the re-occupation. In my opinion, the High Court continued to function as formerly during the occupation and it is exactly the same High Court that is continuing to function to-day.

Secondly, is this present Originating Summons a new proceeding separate and distinct to, although connected with, the Japanese Originating Summons? In this connection Ordinance 37 of 1946 which came into force on the 15th January 1947, is of paramount importance. Its short title is "the Japanese Judgments and Civil Proceedings Ordinance, 1946" and the long title reads "An ordinance to make provision with regard to judgments, orders and decrees of Japanese Courts *and for the carrying on of proceedings instituted in such Courts* during the period of Japanese occupation."

In Section 2 "appropriate Court" is defined as follows:—

> 'appropriate Court' means in relation to proceedings in, or decrees of, any Japanese court which exercised or purported to exercise the original or appellate civil jurisdiction, any of the Courts of the Colony having jurisdiction in the proceedings in question under the Courts Ordinance;
>
> 'Japanese court' means any court set up or continued .....in the Colony by the Japanese, exclusive of criminal courts.

Section 3(1) reads as follows:—

> Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may, within three months from the commencement of this Ordinance, or within such extended time as the appropriate Court may allow, apply in the prescribed manner to the appropriate Court for an order —
>
> (a) that such decree be set aside either wholly or in part; or
>
> (b) that the applicant be at liberty to appeal against such decree.

The marginal note to Section 4 reads "Carrying on proceedings of Japanese courts", and the section provides for the carrying on of proceedings pending at the cessation of the Japanese Occupation in the appropriate Court. Mr. Shearn argued that the present Applicants were not parties to the Japanese Originating Summons and that the Japanese Custodian was not made a Defendant to represent them and that therefore this present Originating Summons is a new proceeding. It is true they were not named as Defendants but one must assume that the Custodian was named as a Defendant to represent persons interested in the subject matter of the application, in accordance with the Rules of Court. If he was not supposed to represent them — who did he represent and why was he made a party? In actual fact he neither entered an appearance nor took any part whatsoever in the proceedings, which, as I have said, were argued *ex parte*.

I have studied the authorities quoted by Mr. Shearn on this part of his submission, namely the *Strousberg* case, *Gourju Will Trust* case, and *Webber* p. 219, none of which do I consider support his submission on the present facts, but the *Kelantan* Case is relevant. In this case there had been an Arbitration and an Award, all of which was extra judicial, as arbitration is a specific and statutory method of settling disputes without recourse to the Courts. It is true that the Kelantan Government had attempted to have the Award set aside and had failed to do so, even in the House of Lords and the Award was confirmed. It was argued in the House of Lords that by such attempts the Sultan had waived his sovereignty, firstly by assenting to the Arbitration and secondly by applying to the Court to have the Award set aside. Lord Cave at pp. 809 and 810 gives his reasons for rejecting this argument as do all the other Law Lords, except Lord Carson, who gave a dissenting judgment in this respect at pp. 833-835. The crux of the point was whether in a subsequent application by the successful party to the Arbitration to have the Award made an Order of Court, so that such Award could be enforced by way of execution, such latter application was a new proceeding. The Sultan claimed privilege and his prerogative and objected to the jurisdiction of the Court to hear this application, and the point was whether he had waived such privilege and prerogative by assenting to and being a party to the earlier Arbitration and subsequent application to set the Award aside. The Award by itself, although confirmed by the highest Tribunal in the land, was not an

Order of Court for payment of the compensation awarded, and there was no effective method of enforcing it, except by an application to have such Award made an Order of Court. One can well understand the Government or Sultan objecting to having its or his own property levied upon by way of execution. It was held by a majority of the Law Lords that such application was a new proceeding to which the Sultan had not assented or waived his prerogative. In his dissenting judgment on this point, Lord Carson's remarks are illuminating and I believe that it is a well known fact that the "palpable injustice" to which he refers was remedied many years later, by an *ex gratia* payment of compensation in respect of the amount awarded under the Arbitration proceedings.

The facts and circumstances of the *Kelantan* Case are very different to those in this present case, and in my opinion it is Ordinance 37 of 1946 that is the conclusive factor. It is to be noted also that one of the reliefs asked for is that the Applicants may be at liberty to appeal against the whole of such Japanese Decree.

This is in accordance with Section 3(1) of the Ordinance and follows paragraph (b) thereof. The Applicants are certainly persons "aggrieved by such decree" and as such are entitled to make the application under the Ordinance.

I have, necessarily, had to go into all these matters at considerable length and it may therefore be advisable to summarize my conclusions briefly. These are :—

(1) That the status of His Highness the Sultan of Johore, prior to the 20th October 1945, was that of an independent Sovereign Ruler limited only as set out in the Agreements of 1885 and 1914, which did not affect such Sovereignty.

(2) That in consequence of the Agreement made by him with His Majesty on the 20th October 1945 and the subsequent Malayan Union Order in Council 1946 His Highness thereby lost his former status of being an Independent Sovereign Ruler. That any attributes of Sovereignty that remained to him were courtesy prerogatives and privileges accorded to him by His Majesty, at His Majesty's discretion or as set out in the Malayan Union Order in Council.

(3) That in consequence of the Agreements dated the 21st January 1948, which revoked such prior Agreement, and the Federation of Malaya Order in Council 1948, which came into force on the 1st February 1948 and revoked the Malayan Union Order in Council, His Highness, thereafter, regained his former status of a Sovereign Ruler but that such Sovereignty is limited, as set out in such Agreements and Order in Council. That subject thereto and as such Sovereign Ruler, His Highness is entitled to the immunities, privileges and prerogatives usually accorded by the comity of nations to a Sovereign Ruler and he is not subject to the jurisdiction of this Court, unless he has submitted to such jurisdiction.

(4) That His Highness submitted himself to the jurisdiction of this Court in presenting the Originating Summons in 1945 and obtaining a decree thereon.

(5) That this present Originating Summons No. 23 of 1947 is not a new proceeding but a continuation of such earlier proceedings as authorised by Ordinance 37 of 1946.

It follows, therefore, that, in my opinion, this Originating Summons can and should continue in view of such waiver and submission to the jurisdiction of this Court. This summons to set aside the same and stay all proceedings thereunder is therefore dismissed with costs. I certify for two counsel.

Summons Dismissed.

APPENDIX.

Colonial Office,
Church House,
Great Smith Street,
LONDON, S.W.1.
9th June, 1948.

The Honourable Mr. Justice T. A. Brown.

Sir,

I have the honour to refer to your letter of the 21st November, 1947 in the matter of Originating Summons No. 23 of 1947, and to state as follows.

2. Johore is a State in the Federation of Malaya. His Majesty's Government recognises His Highness, Major-General Sir Ibrahim ibni Almarhum Sultan Abu Bakar, D.K., S.P.M.J., G.C.M.G., G.B.E., G.C.O.C.(I) Sultan of Johore, as the ruler of the State. As such he exercises attributes of sovereignty.

3. The position of the State of Johore as a member of the Federation of Malaya is governed by the Federation of Malaya Agreement, 1948, made between His Majesty the King and the Rulers of the several States in the Federation, which contains inter alia, provisions to the following effect. Legislative power over a wide range of subjects is conferred upon a federal legislature

consisting of a High Commissioner (appointed by His Majesty) and the Rulers of the member States (including the Sultan of Johore, acting with the advice and consent of a federal Legislative Council (the residual legislative power being vested in the legislatures of the States and Settlements comprising the Federation). The Executive authority of the Federation is substantially vested in the High Commissioner. A federal court of unlimited jurisdiction is established and appeals therefrom lie to His Majesty in Council. Judges are appointed by the High Commissioner in the name of His Majesty and of the Rulers of the member States of the Federation. The Agreement provides for a federal citizenship; at the same time it specifically recognises the continuance of the status of subjects of the Ruler of any of the States. Amendment of the Federation Agreement cannot be effected without the concurrence of His Majesty and of either the Rulers of the States or the Conference of Rulers of which they are all members.

4. Under the Johore Agreement, 1948, made between His Majesty and His Highness the Sultan, His Highness undertakes to accept the advice of a British Adviser on all matters connected with the government of the State other than the Muslim religion and the custom of the Malays.

5. By the Federation of Malaya Agreement, 1948, it is provided that in State matters laws are to be made by the Council of State and require the assent of His Highness. The Executive authority in State matters is vested in His Highness as also is the power of pardon in the case of any person convicted by any court within the State.

6. The relations between His Majesty and the Sultan of Johore are regulated by the two Agreements already referred to (the Johore Agreement, and the Federation Agreement) and, in so far as they are not inconsistent with the aforementioned Agreements, by two Agreements dated, respectively the 11th December, 1885, and the 12th May, 1914. (The Agreement of 1914 made provision very similar to that made by the Johore Agreement, 1948, regarding a British Adviser to the Sultan). Under the Agreements of 1948, His Majesty has complete control of the defence and external affairs of the Federation and of the State, and the Federation Agreement contains a saving of the power of His Majesty and the United Kingdom Parliament to make laws relating to these matters. His Majesty undertakes to protect the State from external attack, and His Highness undertakes that, without the knowledge and consent of His Majesty's Government, he will not make any treaty, enter into any engagement, deal in or correspond on political matters with, or send envoys to, any foreign State.

7. It is provided by the Johore Agreement, 1948 that His Highness's prerogatives, power and jurisdiction within the State shall, subject to the provisions of that Agreement and the Federation of Malaya Agreement, 1948, be those which His Highness possessed on the 1st December, 1941, and, by the Federation of Malaya Agreement, 1948, that save as expressed therein that Agreement shall not affect the sovereignty and jurisdiction of the Rulers in their several States.

8. The independence of the State of Johore and the sovereignty of its Ruler, the Sultan, as recognised in the case of **Mighell v. the Sultan of Johore**, to which reference is made in the communication under reply, are thus subject to the limitations consequent upon fresh rights and obligations under the Agreements of 1948, and generally upon the position of the State as a member of the Federation of Malaya.

9. Copies of the four Agreements referred to above are enclosed.

I have the honour to be,
Sir,
Your most obedient,
humble servant.
Sgd. A. Creech Jones.

COLONIAL OFFICE,
Church House,
Great Smith Street,
S.W.1.
12th November, 1948.

Sir,

I have the honour to refer to the final paragraph of your letter of the 6th July, 1948, in the matter of Originating Summons No. 23 of 1947, and to state as follows.

Before the 20th October, 1945, His Majesty had no jurisdiction in Johore. The relations between His Majesty and the Sultan were regulated by two Agreements, the one dated the 11th December, 1885 (which is referred to in the case of **Mighell v. Sultan of Johore**[1] and the other dated the 12th May, 1914. The status of the State of Johore and of its Ruler, The Sultan, was, therefore, the same as at the time of the decision of the Court of Appeal in the aforementioned case except that, by the Agreement of 1914, The Sultan had agreed to receive an accredited British adviser whose advice he was obliged to ask and act upon "on all matters affecting the general administration of the country and on all questions other than those touching Malay religion and custom". Subject to that Agreement, the internal affairs of the State were regulated by a Constitution enacted in 1895 and various supplements.

The Constitution contained provisions regulating the succession to the Sultanate and empowering the Sultan, who was declared to be "the fountain of honours", to create Orders and Honours. It provided for a Council of Ministers whose function was to assist the Sultan, a Council of State with administrative authority and exercising legislative power with the approval of the Sultan, and an Executive Council over which the Sultan presided, and whose advice he was not obliged to accept. The Prime Minister was appointed by the Sultan and other Ministers were appointed by him with the approval of the Council of Ministers or by the Council of Ministers with the approval of the Sultan. Any Minister could be dismissed by the Sultan. The Council of State consisted of Ministers and other members appointed by the Sultan with the advice of the Council of Ministers. Members of the Executive Council were appointed by the Sultan.

On the 20th October, 1945, an Agreement was made by Sir Harold MacMichael on behalf of His Majesty the King with the Sultan of Johore. The Agreement granted to His Majesty "full power and jurisdiction within the State and territory of Johore". It also preserved the existing Agreements save in so far as they were inconsistent with its terms or with such future constitutional arrangements for Malaya as might be approved by His Majesty.

In exercise of the jurisdiction vested in him by the Agreement of the 20th October, 1945, His Majesty made provision for the government of Malaya in the Malayan Union Order in Council, 1946, and in Royal Instructions dated the 27th March, 1946. Part of this Order came into operation on the 1st April, 1946 and it was provided that the remainder of the Order should be brought into operation on a later date or later dates. In fact the remainder had not been brought into operation on the 1st February, 1948, when the whole Order was revoked by the Federation of Malaya Order in Council, 1948. The Royal Instructions came into operation on the 1st April, 1946, but, to the extent that the Order itself never came fully into operation, they were never fully effective, and they too were revoked on the 1st February, 1948.

In assessing the effect of the Malayan Union Order in Council, 1946, it appears desirable to consider separately:—

(a) those provisions which were intended to be permanent and were brought into operation;

(b) those which, though intended to be permanent, were not brought into operation;

(c) those which were transitional and, having been brought into operation, were intended in due course to be superseded by the provisions mentioned in (b) above;

(d) the provisions of the Johore Constitution so far as it remained in force.

(a) Permanent provisions in operation.

A Union of the Malay States (including Johore) and the Settlements of Malacca and Penang was established and it was provided that they should be administered and governed together under a Governor of the Union appointed by His Majesty. The prerogative power of pardon throughout the Union was vested in the Governor. It was provided that the Chief Justice of the Supreme Court of the Union should be appointed by His Majesty or by the Governor on His Majesty's instructions and that the Judges should be appointed in the same way as the Chief Justice or in such other way as might be provided either by regulations made by the Governor or by law made under the Order. The Order reserved to His Majesty full power to legislate by Order in Council for the peace order and good government of the Union. The Order was subject to amendment or revocation by His Majesty.

(b) Permanent provisions never in operation.

If these provisions had taken effect, the general executive power in the Union would have been exercised by the Governor, who would have been advised by an Executive Council consisting of the Chief Secretary, the Attorney General and the Financial Secretary, together with seven other members to be appointed by His Majesty or in pursuance of His Majesty's instruction. The general legislative power in the Union would have been vested in the Governor acting with the advice and consent of a Legislative Council consisting of the Governor, ex-officio members, and official and unofficial members appointed by the Governor on the instructions of the King. Legislative powers for the State of Johore, in matters declared to be of a purely local nature or under powers delegated by the Legislative Council of the Union, would have been vested in a State Council consisting of the Resident Commissioner, ex-officio members, nominated official and unofficial members appointed by the Governor and elected members. The State Council would also have had such powers of local administration as might be prescribed by law of the Union or as might be allocated to it by the Governor in Council. Any laws passed by the State Council would have required the assent of the Governor or the King; would have been liable to repeal or amendment by the Union Legislature; and would have been void, without formal repeal, if repugnant to the laws of the Union Legislature.

The Sultan of Johore would have had the power, with the advice of an Advisory Council (consisting of himself as President and members appointed by him), to make laws for the State of Johore relating solely to matters of Muslim religion and not involving the imposition, collection or remission of any tax or tithe. A Bill approved by this Sultan's Advisory Council would, before it could be assented to by the Sultan, have required the approval of the Council of Sultans, a body consisting of the Governor as President, the Rulers of the component States of the Union and three ex-officio members.

In the event of any conflict between a law made by the Sultan with the advice of his Advisory Council and a law of the Legislative Council of the Union or State Council of Johore, the provisions of the latter would have prevailed.

(c) Transitional provisions in operation.

As a temporary expedient, an Advisory Council for the Union was set up consisting of the Chief Secretary, the Attorney General, the Financial Secretary and such other members as might be appointed by the Governor. Pending the establishment of the Legislative Council the Governor had the power to legislate for the peace, order and good government of the Union but was first obliged to consult the Advisory Council. The Governor was not required to accept the Council's advice nor, in the exercise of general executive power, to seek its advice.

(d) The Constitution of the State of Johore.

In general, the existing laws were preserved by the Malayan Union Order in Council subject, however, to the provisions of the Order itself. One of the existing laws was the Constitution of the State of Johore which therefore continued in force except so far as its provisions were inconsistent with the Order. The precise extent to which the particular provisions of the Constitution were preserved by the Malayan Union Order in Council, being a matter of legal interpretation, is one upon which the Secretary of State feels that it would not be proper for him to pronounce. His Majesty's Government, however, recognise that the Sultan of Johore possessed sufficient sovereignty in and over Johore to enable him to make on behalf of himself and his successors in the Sultanate the Johore Agreement, 1948, providing for the future government of Johore as a Member State of the Federation of Malaya.

It will be observed, therefore, that under both the provisions of the Order in Council which came into operation and the permanent regime which never took effect, the position of Johore as an independent State and the sovereign powers of the Sultan were materially affected by the incorporation of the State in the Malayan Union and generally by the situation brought about by the Agreement of the 20th October, 1945; but that the State retained its identity and the Sultan continued to possess certain attributes of sovereignty.

Copies of the four Agreements mentioned above were included in my previous letter of the 7th June.

I have the honour to be,
Sir,
Your most obedient
humble servant,
sgd. LISTOWEL.

For the Secretary of State
for the Colonies.